

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



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77-1142

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

x-----x

UNITED STATES OF AMERICA,

Appellee,

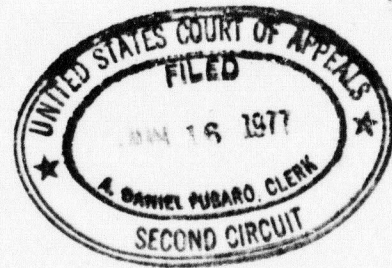
-against-

ANTHONY CICCONE,

Contemnor-Appellant.

x-----x

APPELLANTS REPLY BRIEF



FRIEDMAN FRIEDMAN LEVY & BOTTIGLIERI, P.C.

655 MADISON AVENUE NEW YORK, N.Y. 10021

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY CICCONE,

Contemnor-Appellant.

x-----x

APPELLANTS REPLY BRIEF

POINT I

THE GOVERNMENT SELECTED PSYISCIAN WHO EXAMINED  
THE CONTEMNOR-APPELLANT NEVER EXPRESSED AN  
OPINION AS TO WHETHER THE STRESS  
OF TESTIFYING WOULD BE HARMFUL TO THE HEALTH  
OF THE CONTEMNOR-APPELLANT

In this case, ANTHONY CICCONE, the Contemnor-Appellant, refused to comply with the Order of the Court to testify, on the grounds that the stress of testifying would be dangerous to his health, in light of the fact that he was an epileptic and suffered from seizures when under extreme stress. As was noted in the Appellant's Brief, the Contemnor-Appellant submitted a letter from his physician supporting his position that testifying as ordered might be harmful to him because of his condition, and that therefore the Contemnor-Appellant had "just cause" for refusing to testify.



On page three (3) of the Government's Brief and again on page seven (7) at the footnote, the impression is given that Dr. Moldaver, the government-selected physician, in his report, concluded that testifying would not jeopardize the Contemnor-Appellant's health:

"This [Moldaver's] report concluded that with an increase in his medication, Ciccone could testify before the Grand Jury."

A careful reading of Dr. Moldaver's report (pages 10-A and 11-A of Appellant's Appendix) indicates that, in fact, Dr. Moldaver never really expressed a conclusion or even an opinion on this issue. The relevant part of his report merely states as follows:

"He [Mr. Ciccone] should consult with his neurologist but right now, if he has to testify, he should already increase his Dilantan capsules to four a day."

In effect, the government's doctor clearly recognizes the danger of testifying in this case, by recommending an increased dosage in the Contemnor-Appellant's medication. He gives no assurance that such an increase will safeguard Mr. Ciccone's health. In fact, he explicitly recommends an examination by a neurologist. It is apparent, therefore, that, at the very least, the report by the Government's doctor was ambiguous and equivocal, requiring clarification. The denial of a hearing on this issue, the main thrust of Point I in Contemnor-Appellant's Brief, prevented the Contemnor-Appellant from cross-examining the Government's doctor and giving the District Court sufficient information on which to base its ruling. Failure to give the Contemnor-Appellant a hearing also denied the defense an opportunity to offer additional proof that given the Contemnor-Appellant's propensity to suffer from convulsive seizures when under stress, testifying before the Grand Jury would prove extremely dangerous to his health.

The Appellee cites two (2) cases in their Brief to support the

position that Judge Frankel's Order to testify or be held in contempt was not an abuse of discretion in light of the medical report before him. These cases are clearly distinguishable.

United States v. Russo, 442 F.2d 498 (2nd Cir.), Cert. den., 404 U.S. 1023, Reh. den. 405 U.S. 949 (1971) and United States v. Lee Nan Mam, 274 F.2d 863 (2nd Cir.), Cert. den., 363 U.S. 803 (1960), dealt with the Trial Court's refusal to Order a witness for the government in a criminal case to undergo a psychiatric examination upon application of the defendant. In Russo, the Court held that ordering a witness to undergo a psychiatric examination is "drastic", and in Lee Nan Mam, the Court held that the application by the defendant was not timely made and was made without any basis. It is apparent that these cases are both factually and legally irrelevant to the case at bar. In the instant case the abuse of discretion lies not in the Court's failure to grant an application for the psychiatric examination of a witness, but in the Court's refusal to conduct a hearing to resolve a dispute of fact concerning the physical condition of the "defendant" himself and go to the heart of the matter.



POINT II

THE CONTEMNOR-APPELLANT DID NOT WAIVE  
HIS RIGHT TO A HEARING IN THIS MATTER

The Government contends (page 5 of the Appellees Brief) that the Contemnor-Appellant waived his right to a hearing by failing "to ask for additional time to present arguments or evidence", by expressing "satisfaction with the clarity of his legal justification for refusing to testify", and by the representation by his attorney that he had "no objection to the procedure followed by the Court. . ." (see pages 5 and 6 of Appellees Brief).

The last point is a clear reference to the statement of Mr. Friedman (attorney for the Contemnor-Appellant) at the proceeding before Judge Frankel on March 2, 1977. (See Appellant's Appendix, page 34-A, lines 23-25.) However, this statement cannot be taken out of context. It should be noted that this statement was made after counsel for the Contemnor-Appellant had already raised various objections, including Mr. Ciccone's inability to testify for medical reasons, and Judge Frankel had already overruled those objections. (See Appellant's Appendix, pages 23-A to 40-A and specifically lines 22 to 24.) A reading of the transcript indicates clearly that Mr. Friedman's intention, when he stated that he had no objection to the procedure that the Government had outlined, related not to any hearing on the issues raised, but merely to the necessity of bringing Mr. Ciccone before the Grand Jury, once again:

"MR. FRIEDMAN: No, Judge. Those are the only objections. And, as I say, if you overrule those objections, Mr. Ciccone has asked me to indicate to your Honor that he has prepared to waive the actual going before the Grand Jury again to be asked those questions and he is prepared to advise your Honor that--

THE DEFENDANT: It would be easier for me than going down and up again.

MR. FRIEDMAN: He says it would be easier for him."

(Appellant's Appendix, page 33-A, lines 14 to 23.)

Nor does the Contemnor-Appellant's expression of "satisfaction with the clarity of his legal justification" indicate any waiver of a right to a hearing in this case. As was stated by Mr. Friedman before Judge Frankel on March 2, (see Appellant's Appendix, page 34-A, line 24 and page 36-A, line 2):

"...the positions are quite clear."

This merely means that Mr. Friedman felt that he had had an opportunity to state his objections. However, the issues having been raised, nowhere does Mr. Friedman or Contemnor-Appellant state that a hearing to resolve some of these issues would not be necessary.

Nor should Contemnor-Appellant's failure to ask for additional time to present argument or evidence be considered a waiver of his Due Process rights. As was pointed out in Contemnor-Appellant's Brief, Mr. Ciccone was entitled to an "uninhibited adversary hearing" where he could develop his proof that he had "just cause to refuse the Grand Jury demand". U.S. v. Dinsio, 468 F.2d 1392, 1394 (1972). Under any circumstances, an issue of fact having been raised by the Contemnor-Appellant (whether his physical condition constituted just cause in refusing to testify) he was entitled to a full adversary hearing where testimony could be taken. This is especially true where, as here, the District Court Judge did not have sufficient evidence before him to really make a fair determination.

U.S. v. Indiviglio, 352 F.2d 276, (2nd Cir., 1965) (En banc) Cert. den., 383 U.S. 967 (1966), cited by the Government in their Brief for



to proposition that the Contemnor-Appellant "should not be permitted to argue on appeal that Judge Frankel denied him an adequate opportunity to be heard" (Appellee's Brief, page 6), dealt with the failure of the defendant to make a proper objection before the trial court to the admission of evidence. This is clearly distinguishable from the case at bar where the Contemnor-Appellant raised his objection and the issue is whether the Judge abused his discretion in not conducting a fact finding hearing to resolve the conflict in the vague and somewhat conflicting medical reports then before the Court.

Nor does In re Grand Jury Investigation, 552 F.2d 166 (3rd Cir. 1976) cited by the Appellees (page 7) support their contention that the proceedings conducted in this case comported with Due Process. In that case, proceedings were conducted more than one (1) week after the government had petitioned for a contempt order rather than on the same day as in the instant case. More significantly, the Contemnor-Appellant made no showing of "just cause for refusing to testify" and there was no dispute of the facts. In reaching its decision, the Third Circuit clearly relied heavily on the fact that Contemnor had not raised any defense, by holding that the error, if any, was harmless for this reason. It is apparent that the situation is substantially different in the instant case where a defense is raised and the Court denies the Contemnor the opportunity to develop this defense by not conducting a hearing. (In re Sadin, 509 F.2d 1252 (2nd Cir., 1974), cited on the same page by the Appellees in their Brief, also involved the situation where there had not been any allegation by the Contemnor "just cause for refusing to testify".)

POINT III

CONTEMNOR-APPELLANT WAS HELD IN CONTEMPT  
BEFORE ANY SHOWING THAT THE QUESTION  
HE REFUSED TO ANSWER WAS RELEVANT TO  
THE INVESTIGATION

In Appellees Brief ("Point II"), the Government fails to address the issue of relevance and materiality as raised by the Appellant in his Brief. The Government seems to confuse the issue of the necessity of showing the relevance of a particular witness's testimony to the subject matter of the Grand Jury investigation, with the issue of the necessity of showing the relevance of the question asked to the subject matter of the Grand Jury investigation. The Government argues that Judge Frankel had before him sufficient evidence that Mr. Ciccone's testimony was necessary and material to the Grand Jury's investigation, but it is clear that Judge Frankel had no information before him relating to the material of the particular question which Mr. Ciccone was asked and was held in contempt for refusing to answer.

In Harris v. United States, 382 U.S. 162 (1965), the Supreme Court recognized the importance of a showing of relevance with regard to the particular question or questions which gave rise to the contempt, and the necessity for a hearing with regard thereto:

"Such notice and hearing serve important ends. What appears to be a brazen refusal to cooperate with the Grand Jury may indeed be a frightened silence. Refusal to answer may be due to fear-- fear of reprisals on the witness's family. . . . We can imagine situations where the questions are so inconsequential to the Grand Jury that the fear of reprisals so great that only nominal punishment, if any, is indicated." Harris v. United States, supra., at 166-167; (Emphasis added)



While the issue in the instant case is not the witness's refusal to answer do to fear, it seems clear that the highest court has recognized the need to examine the extent of the governmental interest in the specific questions and answers of the particular witness measured against the interest of the witness in refusing to answer. (Based in this case on the witness's ill health.) If the witness could supply little important information anyway, then clearly he should not be imprisoned for refusal to testify when his reasons involve placing his life in jeopardy.

The simple assertion by the Government that it has an interest in hearing the witness' answers to it's questions does not automatically carry its burden of going forward, when the witness' liberty is at stake and may suffer contempt proceedings for refusing to answer those questions. "A cursory review of the questions posed to the witness or an uncritical acceptance of the Government's assertion would vitiate the Congressional limitations on the reach of the immunity statute. More is required of the District Court." In re Evans, 452 F.2d 1239, 1251 (D.C. Cir., 1971). In the case at bar, the Contemnor-Appellant was asked about an associational relationship with a certain person, relationship presumptively protected by the First Amendment; it is the Government's burden to show that the associations in question must by necessity be excluded from the First Amendment protection, and it does that by showing,

"The Government's interest in the subject matter of the investigation is 'immediate, substantial subordinating'. That there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest.

Bercy v. United States, supra. at 1083."

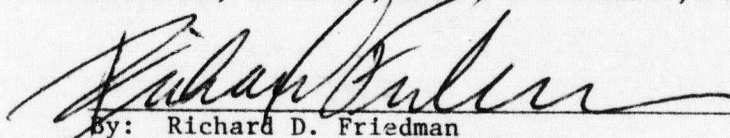


Absent a showing of the relevance of the particular question asked and any determination by the Court with respect thereto, these determinations cannot be made by the Court. Implied in 28 U.S.C. §1826, the recalcitrant witness statute, is the basic notion that not every refusal to answer a question propounded to a witness before a Grand Jury after having been granted immunity, warrants confinement for contempt. Similar state statutes authorizing the court to punish a witness for refusing to testify have been interpreted to require a showing of relevance. "There can be no punishment for contempt for refusing to testify before a Grand Jury unless the Court has shown that evidence demanded may be relevant and proper." Koota v. Colombo, 1966, 17 N.Y.2d 147, 269 N.Y.S.2d 393, Cert. Den. 86 S.Ct. 1923, 384 U.S. 1001. In addition, the District Court's failure to make any finding whatever with regard to the relevance of the question that the Contemnor-Appellant refused to answer, necessarily resulted in an order of confinement, which fails to set forth the particular circumstances of his offense. The order of confinement (page 8-A of Appellants Appendix) is therefore defective. As was noted in People v. Albany County, 142 N.Y. 290, (1895), a case which is still the law in New York:

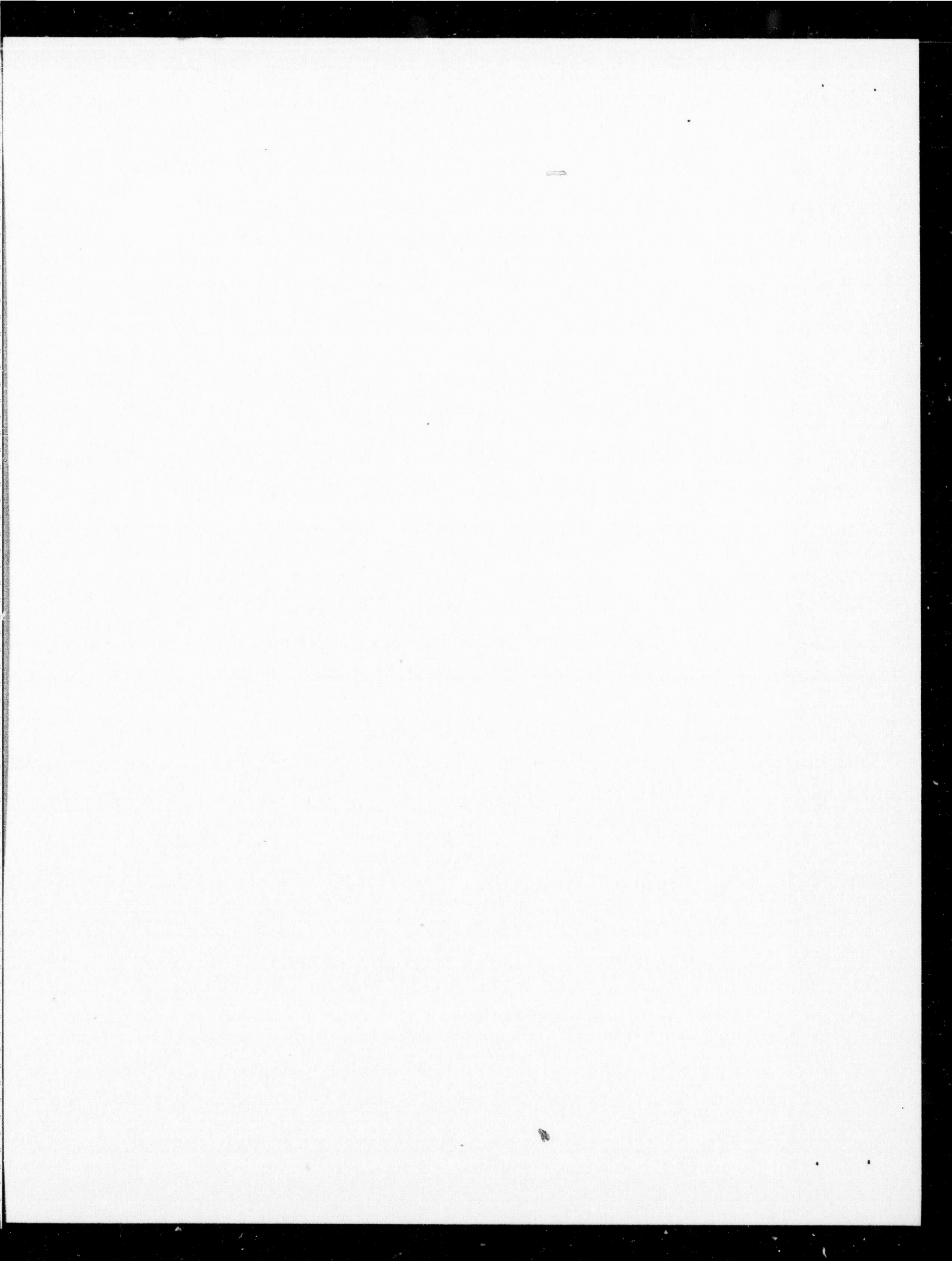
"If the particular circumstances of the offense were not required to be set forth, there would be nothing that the accused could have reviewed, . . . The rule applies with equal force to contempts which are not committed in the presence of the Court."

Respectfully submitted,

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